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Governor

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Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

Division of Water Rights

MICHAEL R. STYLER
Executive Director

JERRY D. OLDS
State Engineer/Division Director

STATE OF UTAH DIVISION OF WATER RIGHTS

DIVISION OF WATER RIGHTS,
JERRY D. OLDS
STATE ENGINEER,

Claimant

v.

FLOYD YARDLEY AND
DALE GUBLER

Respondents.

MEASURING DEVICE NOTICE

No. SEAA 1111

TO: FLOYD YARDLEY AND DALE GUBLER

The high flows of the Beaver River during 2005 did considerable damage to the head gates, control structures, and measuring devices in the reach of Beaver River below Patterson Dam. Because of this damage, Ron Roberts, water commissioner, has indicated he is unable to regulate and measure the flows at the **Emerson Ditch diversion** because of the lack of an adequate control structure and measuring device. Section 73-5-4 of the Utah Code Annotated, 1953 as amended, states in part:

"Every person using water in this state shall construct or install and maintain a substantial head gate, cap, valve or other controlling works, weir, flume and measuring device at each point where water is diverted or turned out, for the purpose of regulating and measuring the quantity of water that may be used. Such controlling works or measuring device shall be of such design as the state engineer may approve and so that the same can be locked and kept set by him or his assistants... If the owner of irrigation works, canals, reservoirs, wells, pumps or tunnels shall refuse or neglect to construct such headgates, caps, valves, flumes or measuring devices after thirty days notice to do so by the state engineer, the state engineer may forbid the use of water until the user thereof shall comply with this requirement, or the state engineer may proceed to construct or install or cause to be installed such controlling works or measuring devices, and the cost of the same shall be a lien against the lands and water rights served thereby, and the state engineer is authorized to bring such action in the name of the state to foreclose such lien."

Therefore, you are hereby notified that your diversion must be equipped with a functional and accurate measuring device and an operational and lockable headgate or control structure. These improvements must be completed prior to April 24, 2006. We would recommend that you talk with the commissioner to see what he would recommend be installed in your particular situation.

Your diversion will be inspected for compliance. If it is not in compliance, an Order to Cease the Use of Water will be issued from the State Engineer. If such an order is issued, the diversion will be tagged, closed, and locked by the water commissioner. In situations where the diversion cannot be closed, the State Engineer will commence administrative enforcement actions in accordance with Sections 73-2-25 and 26 (see attached statute with relevant portions bolded and highlighted).

Thank you for your cooperation in attending to this matter in a timely manner. If you have any questions concerning this notice, please contact Mike Silva by phone at 801-538-7430 or by e-mail at MikeSilva@Utah.Gov or Kurt Vest, acting Regional Engineer, by phone at 435-586-4231 or by e-mail at KurtVest@utah.gov.

Dated this 24 day of MAY, 2006



Lee H. Sim, P.E.
Assistant State Engineer

cc: Kurt Vest, acting Regional Engineer
Kerry Carpenter, Enforcement Engineer
Ron Roberts, Water Commissioner

SCANNED

73-2-25. State engineer enforcement powers.

(1) For purposes of this section, "initial order" means one of the following issued by the state engineer:

- (a) a notice of violation; or
- (b) a cease and desist order.

(2) (a) The state engineer may commence an enforcement action under this section if the state engineer finds that a person:

(i) is diverting water for which no water right has been established;

(ii) is diverting water in violation of an existing water right;

(iii) violates Section 73-5-4;

(iv) violates Section 73-5-9;

(v) violates a written distribution order from the state engineer;

(vi) violates an order issued under Section 73-3-29 regarding the alteration of the bed or bank of a natural stream channel; or

(vii) violates a notice or order regarding dam safety issued under Chapter 5a, Dam Safety.

(b) To commence an enforcement action under this section, the state engineer shall issue an initial order, which shall include:

(i) a description of the violation;

(ii) notice of any penalties to which a person may be subject under Section 73-2-26; and

(iii) notice that the state engineer may treat each day's violation of the provisions listed in Subsection (2)(a) as a separate violation under Subsection 73-2-26(1)(d).

(c) The state engineer's issuance and enforcement of an initial order is exempt from Title 63, Chapter 46b, Administrative Procedures Act.

(3) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the

state engineer shall make rules necessary to enforce an initial order, which shall include:

(a) provisions consistent with this section and Section 73-2-26 for enforcement of the initial order if a person to whom an initial order is issued fails to respond to the order or abate the violation;

(b) the right to a hearing, upon request by a person against whom an initial order is issued; and

(c) provisions for timely issuance of a final order after:

(i) the person to whom the initial order is issued fails to respond to the order or abate the violation; or

(ii) a hearing held under Subsection (3)(b).

(4) A person may not intervene in an enforcement action commenced under this section.

(5) After issuance of a final order under rules made pursuant to Subsection (3)(c), the state engineer shall serve a copy of the final order on the person against whom the order is issued by:

(a) personal service under Utah Rules of Civil Procedure 5; or

(b) certified mail.

(6) (a) The state engineer's final order may be reviewed by trial de novo by the district court in:

(i) Salt Lake County; or

(ii) the county where the violation occurred.

(b) A person shall file a petition for judicial review of the state engineer's final order issued under this section within 20 days from the day on which the final order was served on that person.

(7) The state engineer may bring suit in a court of competent jurisdiction to enforce a final order issued under this section.

(8) If the state engineer prevails in an action brought under Subsection (6)(b) or (7), the state may recover all court costs and a reasonable attorney fee.

SCANNED

73-2-26. Administrative penalties.

(1) (a) **As part of a final order issued under Section 73-2-25, the state engineer may order that a person to whom an order is issued:**

(i) **pay an administrative fine not to exceed:**

(A) **\$5,000 for each knowing violation; or**

(B) **\$1,000 for each violation that is not knowing;**

(ii) **replace up to 200% of water taken; and**

(iii) **be liable for any expense incurred by the state engineer or division in investigating and stopping the violation.**

(b) The definition of "knowingly" under Subsection 76-2-103(2) shall apply to determinations under Subsection (1)(a)(i).

(c) The penalties described in Subsection (1)(a) shall be in addition to:

(i) any criminal penalty established for a violation described in Subsection (1); and

(ii) any private right of action.

(d) (i) **Each day of a continuing violation of the provisions described in Subsection 73-2-25(2)(a) or an initial or final order issued under Section 73-2-25 is a separate violation.**

(ii) A penalty may not be imposed for a violation of the provisions listed in Subsection 73-2-25(2)(a) or an initial or a final order issued under Section 73-2-25 for a violation occurring more than 12 months before the day on which a notice of violation is issued.

(e) Separate violations under Subsection (1)(d) may be consolidated for resolution in one enforcement proceeding under Section 73-2-25.

(f) The state engineer has discretion to pursue an administrative fine, order requiring replacement, or both.

(2) Before imposing a fine or ordering replacement under Subsection (1), the state engineer shall consider:

(a) the value quantity of water unlawfully taken, including the cost or difficulty of replacing the water;

(b) the gravity of the violation, including the economic injury or impact to others;

(c) whether the person subject to fine or replacement attempted to comply with the state engineer's orders; and

(d) the violator's economic benefit from the violation.

(3) (a) The state engineer may require that the water unlawfully taken be replaced after:

(i) a person fails to request judicial review of a final order issued under Section 73-2-25; or

(ii) the completion of judicial review, including any appeals.

(b) The state engineer's order shall require that replacement of water begin within one year of the day on which:

(i) the time period for requesting judicial review of a final order issued under Section 73-2-25 expires without a person requesting judicial review of the final order; or

(ii) the completion of judicial review, including any appeals.

(4) Water replaced under Subsection (3) shall be taken from water that the person subject to the order requiring replacement would be entitled to use during the replacement period.

(5) (a) If the state engineer issues an order requiring replacement, a copy of the order shall be placed in the Division of Water Rights' water rights records.

(b) The order requiring replacement shall constitute a lien upon the water right affected if the state engineer files a notice of lien in the office of the county recorder in the county where the place of use of the water right is located.

(c) A notice of lien under Subsection (5)(b) shall include a legal description of the place of use of the water right.

(6) **Any monies collected under this section shall be deposited into the General Fund.**